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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/724,379	11/28/2003	Thomas Dietz	17127	9652
7590	07/19/2006		EXAMINER KUGEL, TIMOTHY J	
Leopold Presser Scully, Scott, Murphy & presser 400 Garden City Plaza Garden City, NY 11530			ART UNIT 1712	PAPER NUMBER

DATE MAILED: 07/19/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

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<b>Advisory Action Before the Filing of an Appeal Brief</b>	<b>Application No.</b> 10/724,379	<b>Applicant(s)</b> DIETZ, THOMAS
	<b>Examiner</b> Timothy J. Kugel	<b>Art Unit</b> 1712

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 30 June 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1.  The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
- a)  The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2.  The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3.  The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a)  They raise new issues that would require further consideration and/or search (see NOTE below);  
(b)  They raise the issue of new matter (see NOTE below);  
(c)  They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d)  They present additional claims without canceling a corresponding number of finally rejected claims.
- NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).
4.  The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5.  Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
6.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7.  For purposes of appeal, the proposed amendment(s): a)  will not be entered, or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: 1.

Claim(s) rejected: 1,4,7,10 and 13-19.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8.  The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9.  The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10.  The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11.  The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
see attached Detailed Advisory Action.
12.  Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_
13.  Other: \_\_\_\_\_.

**DETAILED ADVISORY ACTION**

1. Claims 1, 4, 7, 10 and 13-19 are pending as amended on 30 June 2006, claims 2, 3, 5, 6, 8, 9, 11, 12 and 20 being cancelled.
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

***Claim Objections***

3. Applicant's amendment, filed 30 June 2006, with respect to the inclusion of the term 'skin identical free' to the limitation of claim 19 has been fully considered and is corrective.

The objection to claim 19 has been withdrawn.

4. Claim 1 is objected to because of the following informalities: Claim 1 is shown with the status identifier 'Currently Amended' however it shows no difference from the claims amended on 24 March 2006 and therefore should show the status identifier 'Previously Presented'. Appropriate correction is required.

***Claim Rejections - 35 USC § 112***

5. Applicant's amendment, filed 30 June 2006, with respect to the elimination of the limitation 'or to a water phase' has been fully considered and is corrective.

The rejection of claim 17 under 35 USC 112 1<sup>st</sup> paragraph has been withdrawn.

***Claim Rejections - 35 USC § 102***

6. Claims 1, 4, 7, 10 and 13-19 stand rejected under 35 U.S.C. 102(b) as being anticipated by Shiroyama.

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Shiroyama teaches an aqueous ceramide composition (Abstract, ¶0001) comprising 1.0 to 5.0% by weight (Abstract, ¶0012) of a ceramide—including phytosphingosine (¶0004)—that are recovered from mammalian tissues (¶0030), 20:1 to 1:3 of the ceramide—which calculates to 0.05 to 15% by weight—of an nonionic or anionic surfactant (¶0046)—including polyoxyethylene sorbitan fatty acid esters, polyoxyethylene sorbitol fatty acid esters, polyoxyethylene glycerol fatty acid esters, polyoxyethylene fatty acid esters, polyoxyethylene (hydrogenated) castor oil derivatives and sucrose fatty acid esters and mixtures of two or more suitable surfactants (¶¶0042-0043), 0.5 to 2% of a fatty alcohol such as cholesterol (¶¶0048 and Example 5 Table 1 and Comparative Example 2 Table 2), 70 to 88% by weight of water (Examples 1-5 Table 1) and auxiliary components such as humectants (¶0056).

Shiroyama further teaches a process for preparing the above compositions comprising heating the components except the water to 80 to 120° C and adding to the water, mixing uniformly and cooling to 5 to 40° C (¶0060), and an oil-in-water emulsion comprising the above composition at 5-25% by weight (Examples 9-18 ¶¶0067-0076 and Tables 4-5).

#### ***Response to Arguments***

7. Applicant's arguments filed 30 June 2006 have been fully considered but they are not persuasive.

Applicant argues that Shiroyama does not teach a free sphingoid base, a water-based emulsifier wax gel, an oil-in-water emulsion or processes for making the gel or emulsion, particularly arguing—but providing no evidence—that Shiroyama teaches

ceramides which differ from the claimed free sphingoid bases; further arguing that Shiroyama's teaching of phytosphingosine is from prior art improved upon by the Shiroyama process.

While applicant's argument is correct that Shiroyama's explicit disclosure of phytosphingosine is directed to improved-upon prior art, Shiroyama explicitly refers to ceramides synthesized by known processes such as that of Japanese Patent 7-165690. US Patent 5,665,778 (Semeria hereinafter) is an English language equivalent to Japanese Patent 7-165690 and discloses ceramides obtained by the claimed sphingosine or sphinganine, which applicant's disclosure and original claims define as both ceramides and free sphingoid bases.

Since Shiroyama teaches the same components and the same processes as claimed, one of ordinary skill in the art at the time the invention was made would have expected that a water-based emulsifier wax gel and an oil-in-water emulsion respectively would inherently be formed as claimed.

### ***Conclusion***

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Timothy J. Kugel whose telephone number is (571) 272-1460. The examiner can normally be reached 6:00 AM – 4:30 PM Monday - Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Randy Gulakowski can be reached on (571) 272-1302. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

9. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

TJK  
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